

The Problem of Diminished Responsibility in Georgian Criminal Law

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Abstract

The article emphasizes the problem of diminished responsibility in Georgian criminal law. The research pays attention to the historical aspect of diminished responsibility and problem of free will in criminal behavior of a person with diminished responsibility. The article provides information about the list and characteristics of psychical anomalies and other circumstances that cause diminished responsibility. The research discusses the issue of relationship between the guilt and diminished responsibility. Accordingly, in author's opinion, diminished responsibility includes all circumstances (except mental illness) that mitigate one's guilt at the time of committing crime, in spite of its causing grounds. At the same time, the article gives a new definition of diminished responsibility that differs from legislative definition.

Keywords: criminal liability, diminished responsibility, free will, mental illness, psychical anomalies.

Introduction

Diminished responsibility is a new and unexplored issue in Georgian Criminal Law. On June 1, 2000 a new Criminal Code was enforced and Article 35 introduced diminished responsibility. The reason for considering this issue is clear. In the conditions of democratization and legal reforms carried out in the country it became necessary to implement such changes in the Criminal Law ensuring more guarantees in terms of protecting human rights and freedoms. Under the existing conditions it was impossible to prove criminal liability. The principle of fairness required an individual approach towards the person who had perpetrated unlawful action, maximally taking into consideration of the offender's mental conditions. Otherwise, it would be impossible to substantiate the principle of guilty liability as mental disorder affects the intellectual and volition spheres of a person. Furthermore, it causes a defect of thought and volition that finally influences criminal liability and the imposition of penalty.

Further, those who have committed violent acts were characterized by various mental deviations. The existed reality caused the Georgian legislators to adopt Article 35 diminished responsibility. It is worthy to note that this is an indisputably positive event for development of Georgian Criminal Law.

Nevertheless, introduction of diminished responsibility raises particular questions for Georgian lawyers and legal scholars, namely, should a court always consider diminished responsibility as a mitigating condition while

imposing penalty? What kind of mental illness does lead to diminished responsibility? What kind of other circumstances should lead to diminished responsibility? What is the relation between diminished responsibility and guilt?

The purpose of the present work is to provide a discussion of the diminished responsibility issue with respect to various aspects as well as to present the topic on the whole and to formulate a new vision on diminished responsibility.

Historical Review

Notwithstanding the fact that the Georgian legislature was unaware of a special norm on diminished responsibility, it can be said based on the Georgian sources dating from X century that while imposing punishment, age and mental conditions were taken into the consideration. It is worthy to note that Ivane Javakhishvili discussed the following in his works: "According to the Law of Ioanne Mmarkhveli (Fast-Holder), a sin perpetrated under age of 30 is worth forgiving". Further, in opinion of Eqvtime Takaishvili, "until one's age of 30, mind ignorance and "hot" body influence on men very much and because of that it is ruled maximally lightly". Nevertheless, Iv.Janakhishvili found this opinion to be doubtful and reckoned that the verge of insanity should not exceed a time-limit of puberty (15-16 years) or at least, a full-age for military service or civil responsibility (21-22 years) (Javakhishvili I., 1929, pp.268-269). As it is widely known, the 19th century is considered to be as the beginning of development of forensic psychiatry as an independent branch of psychiatry. Furthermore, in

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this period the first works in psychiatry and forensic psychiatry were published, various mental illnesses with their respective classifications were described, for instance, the famous French Psychiatrist F. Pinel gave the classification of mental illnesses that excluded responsibility, namely: idiocy, imbecility, mania and melancholy. F. Pinel and Esquirol gave the description of such conditions that later were titled as psychopathy. In 1877, the English Psychiatrist Maudsley suggested a new term "pathological development" and before it, in 1835 another English Psychiatrist P. Richard divided the mental illnesses into intellectual and moral illnesses (Ushakov G., 1978, pp.18-20).

In this period, the first manual on forensic psychiatry for the lawyers was published. In 1847 G. Blossfeld presented a work named "Outlines of Forensic Psychiatry for Lawyers, adapted for academic studies at the Russian Universities". In this work three types of mental illnesses were marked that fell under discussions of the legal-psychiatric studies. These illnesses were imbecility as an inborn disease, madness that might be momentary (short-term), periodical or permanent; and monomania (Morozov G., Lunts D., Felinskaya I., 1976, pp.31-33). Later in 1883, a monograph by V. Kandinsky, under the title "Occasions of Doubtful Mental Condition before the Jury" was published, setting forth the general signs of psychopathy. In 1885, another monograph by the Russian Psychiatrist V. Bekhterev was edited, dedicated to psychopathy and their forensic-psychiatric importance (Sirojedinov D., 1998, p. 20).

As a result of those works, as well as clinical observations done by European and Russian psychiatrists, a group of mental illnesses were pointed out that fell under the frontier neural-psychical deviations in contemporary psychiatry. Such deviations in majority cases did not exclude consciousness, i.e. persons, who commit a crime in condition of such deviations still carry legal responsibility (are conscious) though they have some psychical anomalies that influence their actions.

All the above-said raised the following questions before lawyers and the psychiatrists. How the criminal liability issue of those persons with such psychical anomaly should be solved, if such people are not deemed as having diminished responsibility? How fair and advisable should it be to punish them similar to the healthy offenders? Many opinions were provided in respect to these questions which turned into a subject of unfinished discussions. If irresponsibility always embraced psychical pathology, consciousness did not always mean the norm of psychic. Finally, the legislator was faced to adopt the norm of diminished responsibility (Sirojedinov D., 1998, p.22).

The term "diminished responsibility" was first used in the Criminal Codes of German Lands, namely: Baden in 1845, (par. 153), Bavaria in 1848 (par. 106), Braunschweig in 1840 (par. 66), Hamburg in 1869 (par. 59), Hanover in

1840 (par. 94), Saxons in 1841 (par. 884), Saxen-Altenburg in 1841 (par. 41), Württemberg in 1839 (par. 98), Thüringen in 1850-1852 (par. 59). In all these Codes imbecility, incomplete development, extreme old age, drunkenness, absolute lacking of education, extremely negative and immoral environment in childhood were considered the reasons causing diminished responsibility. In all these cases a reduction of punishment were anticipated. Diminished responsibility is also determined in the Criminal Codes of other European countries, of Denmark in 1866 (par. 39), Finland in 1889 (par. 4), Greece in 1833 (par. 87), Sweden in 1864 (par. 6). It is worthy to note that in all these Codes diminished responsibility serves as a mitigating circumstance for punishment (Sirojedinov D., 1998, p.23).

The Sociological School played an important role in the determination of diminished responsibility. Famous representatives of the school are F. List, Prins, Van-Hamel, Tarde and others. Further, the International Union of Criminalists made an important endowment for this matter. Members of this Union were the scholars from the USA and almost every European country. In example, in 1896 F. List made a speech on the state of diminished responsibility at the Congress of Psychiatrists in Munich. This speech provoked hard debates that made the issue of diminished responsibility more urgent. It was suggested to use lighter penalties in the cases of persons with diminished responsibility and along with it to award a medical measure of coercion. Many conferences, where the issue of diminished responsibility was actively discussed played a positive role in the development of this concept in Europe. All this served as serious ground for further investigations (Sirojedinov D., 1998, pp. 29-30).

In respect to the so-called Soviet period, it is worthy to note that the irregular attitude towards the issue of diminished responsibility was raised. The legislator's position towards this issue was negative. Moreover, there was no common opinion between the psychiatrists and the lawyers in this regard. In S. Semenov's article, published in 1966, it was correctly noted that "notion of legal responsibility namely, diminished responsibility, is characteristic of a state of mind, i.e. the capability to manage one's own conduct and give an account of it, as it is a volition and intellectual skills of a person. Diminished responsibility is the degree a mentally ill person has that indicates limited capability to manage his/her own conduct or guide oneself. Because of this, it is impossible not to agree that diminished responsibility is reactive as it is" (Semenov S., 1966, pp. 1270-1271).

In the mid 70's the discussions regarding the issue of diminished responsibility renewed with new intensity and various opinions were expressed for and against. The diminished responsibility supporters (as are I. Averbuch, E. Golubeva, G. Chechel, G. Zlobin, B. Nikiforov, and others), they indicated that legislative regulation of di-

diminished responsibility would give possibilities to treat the punishment imposition issue towards the persons with mental anomaly more fairly, as it is impossible that mentally ill person was in the same state at the moment of penalty imposition as the healthy person would be.

As an example, I. Averbuch and E. Golubeva determined diminished responsibility as the reduced capability to give account and guide oneself. I. Sushenko defined diminished responsibility as a state of mind of a person, when capability to give an account and guide one's conduct is not lost totally, but different from the respective norm, namely it is reduced (weakened) in result of this or other psychical anomaly (Mikheev R., 1989, p.65).

In regard to the arguments of the diminished responsibility opponents, they mainly expressed an idea that (i) it is very difficult to set a criteria for diminished responsibility; (ii) responsibility (consciousness) has no degrees; (iii) adoption of diminished responsibility will turn needlessly a basic legal-psychiatric assessment of a person to be examined; (iv) it will cause reduction of punishment towards the person with diminished responsibility notwithstanding the type of a crime perpetrated by him and his personality (Khomovsky A., 1965, pp. 1585-1588), (R.I., 1989), (Mikheev R., 1985, pp.154-155), (Morozov G., Lunts D., Felinskaya I., 1976, pp. 147-148).

Nevertheless, it should also be mentioned that the debates on diminished responsibility still rage today. First, it was caused by the complicity and multilateral character of the issue itself. There are correct as well as wrong views among opinions of the supporters and the opponents of diminished responsibility. The above-stated arguments of the diminished responsibility opponents are not correct because in contemporary psychiatry those mental illnesses are well-studied, and therefore, limit of the capability of a person to give an account of his/her conduct and unlawfulness and guide oneself. Consciousness (legal responsibility) has its degrees, while diminished responsibility could serve as evidence of it. Diminished responsibility will not make superfluous the fundamental study of a state of a person's psyche, on the contrary, it will help to define the type and gravity of particular illnesses exactly. However, it is rather problematic to determine whether punishment should always be mitigated regarding the person with diminished responsibility, notwithstanding the type and gravity of committed crime and his illness. Further, the issue of application of medical coercive measures and their compliance with penalty is also a problem. It must be said that the noted argument of the opponents of diminished responsibility is the most serious one and is of current importance in Georgian reality. Among the views of diminished responsibility supporters, we cannot share the one, due to which diminished responsibility concerns mental illness only. All this denotes the need for deeper research and study of the problem.

Issue of Free Will in Criminal Conduct of a Person with Diminished Responsibility

The issue of free will is a philosophic-psychical point and interesting to Criminal Law. It can serve as an important precondition to inflict criminal liability because a person could be blamed and criminal responsibility could be carried only for perpetration of the illegal act of conditions of free will.

From this point O. Tabidze's arguments are interesting, as far as they indicate effect of free will. A person, different from the automatic physical subjects, usually sets the conscious purposes, selects the reference point of his/her conduct (i.e. selects the purpose), and applies the preferred perpetration form. Pursuant to this opinion, the person acts individually and is not limited by physical (physiological) processes. However, on the other hand, a person is a physical entity, and can determinate only causally, the choice, which is a major predicate of free will, is unfamiliar to him/her. Therefore, there can be a situation where a person is free and not free at the same time (Tabidze O., 1968, p.101). O.Tabidze tried to solve this problem using psychophysical integrity. He discussed the following: "We know that the real action is attributed to the psychophysical integrity and not to its any particular isolated moment. Freedom is under the title of the psychophysical whole" (Tabidze O., 1968, p.101). Person, as the psychophysical whole, does not violate the rules of physics. It is impossible that the person were not determined by the rules of physics, though he is determined not only by the rules of physics that exist beyond the psychophysical whole. Physical entity inside of a person, to the rules of which the person obeys possesses new specific skills that are not characteristic to the physical one beyond this entity. The psychophysical whole is determined by the rules of the physical entity, but this determinacy does not confront possibilities of self-regulation, self-activity and selected deeds (Tabidze O., 1968, p.102).

O. Tabidze touched on the problem of individual's wholeness in his work and mentioned that the whole, in some point, means the "parts" as well, the combination of which will be the whole. The purpose of cognition is to perceive the whole, as well as to realize its additional moments (Tabidze O., 1968, p.153). If we recognize the peculiarity of higher circles and the role of its components (circles) within the whole, then absolute recognition of the whole will be achieved. More understanding of the whole is impossible and is not needed either, besides such understanding is enough for the realization and the practical application of the whole. (Tabidze O., 1968, p.50).

Philosophic comprehension of the whole and its parts will be used as the basis of further research. It means that diminished responsibility, as mitigating circumstance of guilt is the whole, but mental illness, accentuating of char-

acter, temporary insanity and others are the parts contained in the whole. For appropriate perception of the notion and nature of diminished responsibility it is necessary to realize it in whole, as a state that includes all those circumstances that affect the ability to give an account to unlawfulness and the factual character of the action fully and to guide oneself at the moment of the perpetration of crime. Similar understanding of the “whole” and the “parts” will serve as the basis of consciousness and irresponsibility.

The Georgian philosopher O. Tabidze stated, “Consciousness gives us an opportunity to foresee a future, probable action, assess it due to its values and select respectively. Thus, it means that consciousness is a condition of freedom. A person as a reasonable creature is free and shows self-activity, which consists and is based openly on natural determinacy (Tabidze O., 1991, p.163). Coming out of O.Tabidze’s discussion it is obvious that consciousness is an essential condition for freedom in absence of which a person would never be free. Without awareness a person will not be able to assess his/her own conduct, and accordingly will not manage to make the right choices. The lack of which would make it impossible to speak about free will and consciousness.

In regard to the problem of free will, indeterminate and determinate studies should be considered. They ground the problem of freedom of will differently and confront one another sharply. However, as noted in contemporary science, it is impossible to consider neither provisions of determinism, nor indeterminism, or to reject it unilaterally. Due to the opinion of indeterminists, freedom of will is not stipulated at all but it distinguishes itself independently from the outer world. From the point of indeterminism, it is impossible to ground the expediency of responsibility and punishment. Neither determinism enables us to prove criminal liability as it totally rejects free will and thus declares a person as a blind weapon of the outer factors. Contrary to this statement, Prof. T. Tsereteli noted correctly, “Determination of a will of person does not mean fatalism at all, further, it does not mean that this or that action of a person ought to be committed in conditions of desperate necessity, while he/she had no other opportunities to act otherwise. Determinism does not exclude possibility to act in a different way” (Tsereteli T., 1955, p.182).

We also find a correct opinion from Z. Kakabadze, that freedom is a choice, it is an objective reality based on choice. However, the choice always means the measure of choice. What is the measure of choice of the person? At some point, it could be said that we choose according to our interests (Kakabadze Z., 1987, p.23). As can be seen, at the moment of choice certain elements influence person causing the choice from his/her part. For this reason, it is worth noting that every individual is free as much as he/she can bear this freedom and the answer is required accordingly.

Regarding significance of free will in concerning criminal liability, we will touch on the issue of free will in the criminal conduct committed by the person with diminished responsibility. We do not deny the importance of free will in order to base the advisability of criminal liability and punishment. But we cannot share the opinion, expressed in the Criminal Law literature, admitted by the Criminal Law science unanimously, pursuant to which, a person should carry responsibility only in case if he/she committed an action in conditions of free will (Surguladze L., 1997, p.184). Criminal liability shall be imposed on the person with diminished responsibility and the absolute awareness is not necessary in this case. Coming out of it, we cannot argue that only a fully conscious person shall carry responsibility for his/her unlawful action, as the difference between consciousness and diminished responsibility exists in their degrees. This gains decisive importance at the stage of accusation. In addition, in such cases, great importance is given to the degree of characteristics of will and exactly this while referring to the issue of characteristics of will of the person with diminished responsibility. In order to impose criminal liability, existence of absolute freedom of will is not necessary. Here, it is important that the person has not lost freedom of will totally, as lack of which excludes criminal liability. However, freedom of those with diminished responsibility is not the same as those with full consciousness, notwithstanding the fact that in both cases criminal responsibility exists. Based on it, special attention should be paid to free will of persons with diminished responsibility at the stage of accusation and the penalty imposition moment.

A state of diminished responsibility, first of all, is related to existence of mental deviations (anomalies). As it is known, in the case of psychical anomalies, weakening intelligence and volition functioning takes place, namely, the capability to resist temptation, possibility to control one’s action and perceive the situation adequately, to choose the appropriate action, etc is decreased significantly. As a result a person appears to be in the same situation of temporary insanity stress and other similar states. In all the above-mentioned situations (psychical anomaly, temporary insanity, stressfulness), freedom of will at the moment of the offence committal is restricted by psychophysical (inner) or social (outer) elements. In spite of this, criminal liability will be imposed on the person and it would be fair. From this point, V. Frankl’s opinion is correct, according to which a person is not free from the outer or insider conditions but he/she is free while selecting his/her position (attitude) towards them. Conditions do not cause the conduct of person in total. This exactly depends on the person, how much he yields, obeys to it (Ilyin E., 2002, p.17).

Based on the above, it could be stated that criminal liability is inflicted on a person because he had possibility to act otherwise, i.e. to choose the way of his action

that would not be punishable, notwithstanding the fact that he was not free fully. Though even such an extent of freedom (diminished, reduced) is enough in order to impose criminal responsibility. Free will denotes capability and possibility to make a choice out of these or those probable versions of conduct and act following to this choice.

The Nature and Definition of Diminished Responsibility in Georgian Criminal Law:

Psychical Anomalies Causing Diminished Responsibility

The problem of diminished responsibility is the subject of discussion and therefore, there is a difference of opinions among scientists. The difficulty of the matter and uncompleted learning of the latter explain results of these discussions. One cannot learn about diminished responsibility only depending on criminal law science. In this matter, data of philosophy, psychiatry, psychology, pathological psychology and other sciences has a great importance. But solving the diminished responsibility problem itself must take place within the bounds of criminal law science, as it is the problem of criminal law and not of any other one. The Georgian criminal law code connects diminished responsibility only to the psychical disease, in the first part of 35th paragraph, we read the following: "An under age person is not free from criminal law responsibility, who while committing the crime was in a diminished responsibility situation. Because of psychical disease he could not understand the factual character of his action fully or wrongfulness or lead it". Such formulation is not correct, as besides the psychical anomaly (disease) while committing a crime in other circumstances as well may have an influence on a person's ability, limiting a person's consciousness and will while making the crime, for example, temporary insanity, stressfulness and so on.

In clarifying a diminished responsibility situation, psychical diseases (anomalies) have great importance. It is known that modern psychiatry does not divide people only as psychically healthy or psychically ill ones. Mainly, we do sentence for clearly people being just in such circumstance belong to the category of diminished responsibility. These circumstances in psychiatry are called psychical anomalies. We will try to characterize psychical anomalies. It's necessary for a better understanding in criminal question of psychical anomalies to foresee their characteristics while using punishment and the compulsory measures of a medical type, as well as the prophylactic measures.

Psychopathy - In Psychiatry there exist different understandings of psychopathy. Some scientists consider that psychopathy represents an innate deformity, others think that it is a form of pathology, and others consider that psychopaths join gains as well innate pathology.

In spite of differences of opinions, every scientist agrees that psychopathy represents psychic anomaly. It

does not have such characteristic signs of disease, such as the stages of beginning, ongoing or ending. Psychopathies mainly are expressed in behavior, in peoples' relations with the social environment. German psychiatrist Kurt Schnaider said that psychopath is a man, from whose character both he himself as well as the society are damaged (Shostakovich B., 1997, pp.292-294).

Alcoholism – progredient (increasing) disease, which is expressed in pathologic inclination to the spirit beverages, causes dysfunctional situation, abstinent syndrome when quitting its acceptance, and in a far cases – stable somatic neurological disorder and psychical degradation (Sirojedinov D., 1998, p.69).

Remained events of brain injuries belong disorders of non-psychotic character, which is the result of brain injuries. According to the character of trauma (injury) we can divide the patients in two groups: 1) Patients who have open draught wound, as a result of which brain was injured; 2) Patients who got brain closed injury, i.e. it was not followed by breaking the skull bone (Zeigarnik B., 1962, p.72).

Oligophrenia is an innate imbecility or gained in an early childhood (till the age of 3), expressed in psychical backwardness, mainly in an intellectual sphere. There are many classifications of oligophrenia. One of these classifications is a classification offered by G. Sukhareva: Oligophrenia of endogenous nature (is connected to damaging parents' generation cells) for example Syndrome of Dawn.

Oligophrenia is caused by inflectional diseases during pregnancy intoxication, and hormonal disorders. Oligophrenia is caused by different negative influences during childbirth or in early childhood, for example, trauma of childbirth, asphyxia, meningitis, and so on. The psychical backwardness can divide into 3 forms according to hardness and deepness, idiocy, imbecility, and weak-mindedness. For the criminal law weak-mindedness is interesting in this case, as this is a time a man maintains the possibility of understanding personal actions and controlling them. People having weak-mindedness are less adapted towards the environment. Despite this it has characterized primitivism of mind and speech, further, for them it is difficult to think abstractly and separately (Shostakovich D., 1998, pp.329-331).

Neurosis as well belongs to the anomaly situation; in clinical psychiatry they divide into 3 forms of neurosis; neurasthenia, hysteria and psychasthenia.

Neurasthenia is characterized by quick tiredness, lack of ability to work, insomnia, headache, irritation, excitability and apathy. Hysteria is characterized with a special sensibility towards outside irritators and they express all feelings in a distinct emotional form. The most obvious hysteria is expressed in disorders such as paralysis, voice loosing (aphonia) disability of hearing or sight, speech (mutism), moving or standing independently and so on. All

this breaking is developed as a result of psychological trauma, but at this time a person's consciousness is maintained, though limited and misted.

While psychasthenia a person is characterized with action hesitation, untrustworthy, suspicious, complexes of non-value and fears.

As for psychasthenia (neurosis of fixed ideas), it is worthy to note that a man maintains a critical attitude towards such circumstance, and that's why a man tries to hide this situation (Surguladze S., Sharashidze M., Chelashvili A., 1993, pp.17-21).

Epilepsy - Epilepsy is a chronicle-organic disease expressed by repeated paroxysmal (breaking the movement function) disorders (convulsion and non-convulsion) attacks and personal changes as well, weak-mindedness and psychosis (it leads to diminished responsibility when it doesn't achieve to psychotic level).

Epilepsy mainly is expressed in child or adult age. Epilepsy belongs to the number of those diseases causing reason of which (etiology) is unknown. It is connected with a generation factor, as well as with brain injuries. Typical expression of epilepsy is considered to be a big epileptic attack. In such cases, consciousness is turned off. Such an attack develops suddenly, without any preliminaries. It can last for several minutes. Even a small attack comes as suddenly as a big one and is characterized with the same signs and is prolonged for 1-2 minutes. Epilepsy is characterized with so called epileptic equivalents – short psychological disorders, they appear and stop suddenly. They are characterized with a sudden change of a human character towards aggression. By this time such people can cause conflicts, feel uneasy, may harm themselves (scratch, cut face and hands) and break the things. They express the irresistible desire to make aggressive actions. If depressive signs exceed, by this time one can lose attention, cannot concentrate and functioning of intellectual sphere is weakened as well. All this has an influence over anti-epileptics behavior and often becomes the reason for such behavior (Shostakovich B., 1997, pp.210-211).

Psychical disorder caused by brain veins disease is a disorder of non-psychotic character, which is caused by brain veins pathology (atherosclerosis, hypertension). Atherosclerosis is a chronicle disease, which we mainly meet in aged people (55-50). Psychological disorders during the atherosclerosis are expressed by hesitation, inclination to phobias, and in depressive and hypochondria reactions (Shostakovich B., 1997, pp.192-193).

Maniacal-depressive psychosis is characterized by attacking changes, maniacal and depressive phases. This disease is not characterized with progredientality (increasing the personal defect), which is characteristic to schizophrenia, for organ diseases of the brain (it leads to diminished responsibility when it doesn't achieve to psychotic level). Mostly we see this disease in women. In etiology

of maniacal-depressive psychosis generation and organism constitutional characteristics are of great importance. The maniacal phase is characterized by risen character, fastening the psychic processes and psychometric exiting.

Depressive phase is characterized by slowing down the thinking, depressed character and slowing down the movement. Depressive disorders are followed by the delirious opinions of self-flagellation, blaming oneself, humiliation and so on. A patient can refuse food, harm himself, and suicide actions also may appear. Such persons commit illegal actions mainly towards the friends and themselves (Shostakovich B., 1997, pp. 254-255).

Necromancy belongs to psychic anomalies. It is a disease that appears in irresistible inclination to get the narcotic means, caused by physical and psychological attitude towards it. Natural or synthetic origin materials belong to narcotics, which have a specific influence (stimulating, exciting, depressing and hallucinating) on the central nervous system (Shostakovich B., 1997, pp.254-255).

Schizophrenia is an endogenous progredient psychological disease characterized by dissociation of psychological functions, causing personal changes expressed in emotional exhaustion, becoming strange towards the environment, slowing the psychic activity (it leads to diminished responsibility at the time of remission). We see schizophrenia mainly in young at the age of 15-25 years.

A person's thinking and speech, who is sick with schizophrenia, loses his/her aim, sequence and logic. They also are characterized with emotional poverty, inadequacy, and paradoxicalness of their emotions. Schizophrenia causes the injuring of intellectual as well the voluntary sphere, expressed in disharmony and misunderstanding of intellectual and emotional sphere (Shostakovich B., 1997, p.237).

Psychic disease caused by brain infectious separate brain syphilis and progressive paralysis. Brain syphilis belongs to an early form of neuro-syphilis and progressive to later one. Brain syphilis joins the different nervous-psychic disorders that are connected to syphilis disease of brain veins. Persons having this disease, as the practice shows us, can be recognized as responsible and non-responsible ones. They are irritated, having inclination towards the affective reactions, sometimes depressed mood, headaches, mind lowering, and different neurological disorders (Sirojiddinov D., 1998, pp.83-84).

The present paper attempts to report a list of these psychological diseases and their brief characterization that make a person's social adaptation difficult and limit his ability to understand factual character and illegality of own actions and lead them. They represent one of the circumstances causing diminished responsibility. Now I'll try to discuss those circumstances, which in my opinion, also cause the diminished responsibility, though do not belong to the psychological diseases.

Other Circumstances Causing the Diminished Responsibility

Accentuation of character is one such circumstance. Character accentuation is the extreme versions of the norm when different characters of nature are strengthened. At the same time attention should be drawn to weakness of other characters during different psychogenesis influence. During accentuation of the character, some violation can appear during puberty period (puberty crisis), psychic trauma or the influence of hard life situations. Each type of character accentuation is characterized with its weak point “heel of Achilles”, for example, for a hypertime person it can be isolation from friends, compulsory idleness (passiveness), strictly determined agenda, etc (Lichko A., 1983, p.9-10).

Accentuated persons belong to that category, whose balance of excitement and temptation process is broken, causing a great influence over their emotional sphere. As the psychiatrist mentions, accentuation is having psychopath signs and chances that are so high that they will become psychopaths; thus, it's very difficult to differ them in practice. Further, accentuation does not belong to psychic anomalies, though characteristic signs have influence over consciousness of action and ability of control, namely, they limit such ability. Thus, I may note that accentuation represents circumstance weakening blame and therefore, it may belong to diminished responsibility.

Research also proves that accentuation causes a quite high degree of criminality. Further, according to the research of different sciences, 80% of persons having committed a crime had character accentuation while in law obeying society the number of such persons does not exceed 40% (Nazarenko G., 2002, pp.62-63).

The following circumstances that can cause diminished responsibility is **an affect**. It is an emotional feeling, characterized with special intensity. There are two types of affective situations, physiological and pathological affect. Pathological affect is characterized with a complete losing of mind and paralyzing of will. It is equal to the psychotic situation causing responsibility, that's why we are not going to discuss pathologic affect in details. For our purposes, physiological affect is of particular interest, because though it is an emotional feeling as well. Further, we need to discuss it as an improper emotional feeling that is characteristic of any person, in any situation and represents quite the normal situation for a living being. Though, it is such an emotional feeling that represents hard, sudden reactions or irritator, or the factor causing this reaction. As psychologists indicate, emotions are characterized with different intensity, the higher the emotion intensity is, the more they cover a human being's consciousness, emotional intensity, and deepness resulting in making the ability of conscious action more difficult. S. Rubinshtein writes the following: “Affective situation is expressed in

slowing the conscious process. That's why in affective action some measures break the conscious control over the action choosing. Affective action is not regulated by a person fully, as it represents an emotional creature with explosive nature, causing organic changes and heavy reactions” (Rubenshtein S., 1946, pp.495-496).

Circumstance, causing the diminished responsibility must be considered as non-disease physiological situations of an organism, like pregnancy, climax, childbirth, etc. Of course these circumstances do not represent the reasons causing diminished responsibility, but such situations are characterized with changing the psychic processes, limiting the person's ability to govern himself. As mentioned in the medical literature, during climax period (especially in women), we meet a misbalance of emotional and willing sphere, signs of character accentuation and psychotic situation. For example, irritation, depression, excitement, emotional reactions of explosive character and so on.

It is worthy to note that the similar situation takes place during pregnancy. Further, pregnancy is characterized with important physiological and psychic changes in a person. Process of material changing is changed in the organism there is neurosis, irritation, quick tiredness, sleep breaking and so on. Childbirth is a difficult physiological process, as the change of physiological and psychological situation takes place in women. What is expressed is excitement, unbearable pains, quick pulse, high arterial pressure, body trembling, instinct reflect movement, fear, etc. K. Skrobansky mentions that during the childbirth a woman can do thinkable behavior, and even can commit suicide (Skrobansky K., 1946, p.216). Needless to say that somatic diseases as well have an influence on a person's ability to control his/her own actions. Psychogeny represents the main form of somatic diseases having an influence over the psychic, hard psychical reaction towards a person's diseases and its results. As V. Nikolaeva mentions, during somatic diseases, being chronicle can cause material changes, intoxication, and sometimes there are such psychopathic events that results in stable disorders of character.

In addition to a neurosis and psychopathic situation, there are psychotic symptoms (Nikolaeva V., 1989, p.31). We'd like to pay attention to the heliotherapy theory, more precisely, on what kind of influence the natural-space processes have over a person. Heliotherapy is a scientific course that studies the influence of sun activity processes on a person's psychic situation. People pay attention to influence of nature and space over a person from very old times. Egyptian, Indian and many other sources that belong to modern science provide us with the respective evidence. Unfortunately, in Georgia this question does not represent the criminalist's interest while it should be the subject of great attention and scientific research from the jurists' side. This problem has special interest for the study of criminol-

ogy.

The psychic situation is caused by an organism situation, respectively, it can be breaking of some organ (veins, endocrinology, nervous system) causing the proper nature changes in psychic sphere. That's why behavior is an action of the whole organism towards physiological, internal and physical environment. This action is changed in feelings and imaginations by the help of brain and nervous apparatus and forms a person himself and his behavior in each concrete moment (Ivanov N., 1998, p.118).

Criminal Code of Georgia regards underage, as a facilitating circumstance and has some privileges for underage people. A separate part of Criminal Law considers the question of underage responsibility. According to 3rd part of 35th paragraph, "An underage person can be free from criminal law responsibility, if the latter is in situation of diminished responsibility while committing the crime." As Professor O. Gamkrelidze mentions, here we deal with double diminished circumstance of a full responsibility (Gamkrelidze O., 2002, p.76). That's why a legislator's position is logical, who in such case permits freeing the underage person from criminal law responsibility. Psychologists, jurists and physiologists consider the underage factor as circumstance for mitigating responsibility. M. Babaev mentions that in the age of 14-18, process of intellectual development and conscious formation takes place in adult, that's why this situation characteristic to this age can be considered as a mitigating circumstance while making the verdict. This age is characterized with emotional-willing sphere characteristics, such as easy excitement, psychical unstableness, nature changing and impulsiveness, etc (Babaev M., 1968, p.15).

Thus, psychological, physiological and emotional situation of underage people does not give an opportunity to solve their guiltiness and punishment question the same way it is solved in case of adult criminals. Respectively the court considers such circumstances and announces their illegal action as diminished ones. On this we would like to end discussing the circumstances causing diminished responsibility. This, of course, is not a full list of circumstances causing this situation. The main point in my opinion is that legislator(s) and court(s) must consider equal situations and foresee them while deciding the responsibility questions.

Under diminished responsibility we can consider any circumstance that can limit a person's ability to understand the factual and illegal character of his action completely, or lead it. Psychic anomaly itself or any other situation may not cause the diminished responsibility, in other words, we must discuss not only psychic anomaly or committing the crime in such situations, but we shall be discussing its influence over a persons' consciousness and will during committing the concrete illegal action. If it is proved that these circumstances limit a person's consciousness and will, we

must consider them as being diminished responsibility, by all means, and in such cases I believe that criminal's punishment shall be mitigated. Furthermore, diminished responsibility is a so called "diagnosis" made by the court, i.e. when a criminal must receive a mitigated punishment, otherwise existence of the diminished responsibility in Criminal Code loses its sense. From this point, courts actions are correct when they mitigate blame and punishment to persons with diminished responsibility. This became obvious during my research of respective court practice. However, this happens only in case of psychical illnesses because the Criminal Code of Georgia relates diminished responsibility only to the psychical illnesses.

Below we will refer to two examples in concern of this statement.

"E" was found guilty in compliance with the article 177, parts II, paragraphs "a" of the Criminal Code of Georgia (theft with significant damage). Forensic examination stated that schizoid disorder of non-psychosis degree was marked with "E"; he was nervous, conflicting, impulsive, socially isolated, revealed vicissitudes of understanding, had elementary hallucinations with raving ideas, change of mood, and disturbance of sleep. Forensic expertise declared him to have diminished responsibility and reckoned to impose coercive medical treatment towards him.

In a court judgment on case of "E" it was mentioned that he had no previous convictions, was characterized positively, admitted and confessed guilt. All this served as the mitigating circumstance of guilt. He was sentenced to imprisonment for up to two years in length, out of what 1-year was deemed as provisional term. In the court judgment, nothing was told about either diminished responsibility, or coercive medical treatment (Court, case #07050738).

"N" was found guilty in compliance with the article 260, part II, paragraph "a" of the Criminal Code of Georgia (drug sale in large quantities) Forensic examination evidenced that he was marked to have organic-personal disorder of non-psychosis registry, he had changes in emotional sphere, was bent to self-injuries and associated conducts, revealed unnatural tenseness, had impulse and easy irritations, single hearing hallucinations, reduced active attention concentration skills. Examining body defined that he could not entirely give an account to factual character and unlawfulness of his action and guide oneself (diminished responsibility). Imposition of coercive medical treatment on "N" was required. The Court foresaw diminished responsibility of "N" and sentenced him to imprisonment for up to seven years in length, together with coercive medical treatment in direction of drug-addiction (Court, case #0205016).

Accordingly **diminished responsibility represents such the situation of a person, when he/she could not fully understand the factual character or wrongfulness of his/her action because of psychical diseases (anom-**

aly), non-ill psychological situation (affect, stress and so on) or fully guide it. Based on this, it would be beneficial if the legislator foresaw the proper changes and I part of 35th paragraph of Georgian Criminal Law Code was revised respectively. Regarding the 2nd part of the very same paragraph, it should be revised in the following way: "The court must take into account diminished responsibility while making a verdict and mitigate the punishment of the person with diminished responsibility". Needless to say that we must not identify diminished responsibility with the existence of psychic anomaly and other situations. We meet diminished responsibility when the above-mentioned circumstances limit a person's ability to understand his/her own actions while committing the crime. Respectively, if the above mentioned circumstances are established (limiting the consciousness and will) a person's punishment must be decreased and guilt shall mitigated accordingly.

Diminished Responsibility and Guilt

It would be interesting to discuss the issue of relation between guilt and diminished responsibility. Namely, we need to consider why diminished responsibility is considered as mitigating circumstances of guilt. The issue of a relationship between guilt and diminished responsibility caused a variety of opinions in criminal legal literature. A. Zhizhilenko noted that diminished responsibility had a direct relation with guilt, as it served as a mitigating circumstance of guilt (Ivanov N., 1998, p.177). B. Osherovich wrote that problem of diminished responsibility ought to be solved in the perspective of extenuating culpability. Guilt evokes responsibility, but responsibility depends on a degree of guilt. Various views are expressed in literature concerning the degree of guilt. B. Osherovich considered that the degree of guilt is determined by the type of guilt and the degree of consciousness (legal responsibility) (Osherovich B., 1940, pp.62-63). Further, B. Utevsky reckoned that to determine the degree of guilt, all conditions of the case should be considered, as objective and subjective ones (Utevsky B., 1950, p.74). P. Dagal and D. Kotov set forth that the extent of the committed action's public danger influenced the degrees of guilt mostly. Degree of guilt is also defined by the specificities of the perpetrator's psychological attitude, forms of guilt, intent or recklessness. Besides, motive and purpose of crime, as well as characterizing features of the accused person influence the degree of guilt. In addition, degree of guilt is affected by the reasons and conditions of perpetration of crime, such as hard family conditions, coercion or threatening, unlawful conduct of a victim, material, professional or other kind of relationship, etc (Dagal P., Kotov D., 1974, pp.72-74).

According to A. Rarog, besides the forms and types of guilt, peculiarities of content of intellectual and volition processes influence degree of guilt. Besides, motive

and purpose of a crime, specificities of the objective (actus reus) and subjective (mens rea) sides, as well as the features of the perpetration object affect degree of guilt by means of intentional and reckless contents (Rarog A., 1987, p.102).

As we see, in order to determine the degree of guilt, various circumstances should be taken into consideration. Degree of guilt differs according to how the action was perpetrated, intently or recklessly, what was the result of committed act, what was the motive of conduct, how could the person realize his action, unlawfulness degree and many other conditions. Therefore, if degree of consciousness is reduced, degree of guilt will be reduced accordingly. Antonyan and S. Borodin have a different attitude. They indicate that consciousness does not relate to the issues of guilt, as well as guilt does not related to the consciousness (legal responsibility) issues. The same could be said regarding the issue of culpability degree and diminished responsibility relation, as diminished responsibility does not relate to degree of guilt. They wrote that degree of guilt is determined by the elements of (mens rea) and depends on the form of guilt, as are intentional and reckless, types of intent and recklessness, their content. It is worthy to note that they reckon guilt as intent and recklessness which are revealed in committing crime. Diminished responsibility does not comply with guilt, it relates to criminal liability as it was concluded by I. Antonyan and S. Borodin (I. Antonyan, 1998). This wrong position was caused because I. Antonyan and S. Borodin reckoned guilt as a sign of the subjective side (mens rea) and found consciousness as a feature of subject and thought and that there was no immediate union between them. I cannot share the opinion that consciousness is not related to guilt, as well as the view, that diminished responsibility is not related to reduced guilt. Consciousness means a state of a person, when perpetration of action shall be deemed as guilt, i.e. only person with legal responsibility (conscious person) might be culpable. Thus, consciousness is directly connected with guilt and appears to be its mandatory precondition. Besides, diminished responsibility relates to the reduced guilt immediately. It serves as an extenuating circumstance of guilt that is set forth by Georgian criminal legislation as well.

We think that the issue of interrelation of diminished responsibility and criminal unlawfulness is worth discussing. It is interesting whether diminished responsibility reduces only degree of guilt or degree of wrongful act as well, as unlawfulness perpetrated in conditions of diminished responsibility differs from the degree of gravity of unlawfulness committed in a state of a full legal responsibility.

As we know, determination of degree of guilt significantly depends on the degree of wrongful acts and other mitigating and aggravating circumstances of responsibility. Prof. O. Gamkrelidze noted that criminal unlawfulness

is an illegal action that is provided under the Criminal Law. We should make a difference between the term of unlawfulness from the notion of illegality. Illegality means resistance between the action and law. This is the relation between those two events that are revealed in confrontation with one with another. Unlawfulness itself is an illegal action (Gamkrelidze O., 1989, p.124). Unlawfulness is an objective category as it carries similar importance for every person. The law states similar measures for everyone's conduct, notwithstanding what are personal possibilities of an individual one. Criminal unlawfulness covers two things *corpus delictum* and unlawfulness (public danger) (Gamkrelidze O., 1989, p.137). Unlawfulness, similar to guilt, has its degrees. E.g., murder of two or more persons is unlawfulness of higher degree than the murder of one person. Accordingly, in such case, degree of guilt would be higher, that was influenced by the degree of unlawfulness. However, we cannot say that situation is the same in regard to unlawfulness committed in conditions of diminished responsibility and full consciousness (legal liability). For example, a murder perpetrated in temporary insanity and murder with selfish ends or committed from the view of revenge would both be deemed as unlawful to the same degree, though various sanctions would be defined for these actions by the law. This is caused by the degree of guilt, as degree of guilt of the murder perpetrated in temporary insanity differs from the murder committed with the view of revenge. Thus, negative answers should be given to the questions that we set forth above, because in our opinion, diminished responsibility influences degree of guilt and not degree of unlawfulness. We may distinguish degrees of guilt in respect to unlawfulness of a similar degree that could be proved by the above-noted examples. As Prof. O. Gamkrelidze mentioned correctly, unlawfulness in an objective category, but guilt is the personal one. In regard to guilt, it should be defined whether an offender can carry responsibility due to his/her personal possibilities and to what extent (Gamkrelidze O., 1989, p.137).

Taking this into account we may say that diminished responsibility influences the degree of guilt and because of that it serves as mitigating circumstance of guilt. Diminished responsibility is a condition when a person cannot completely give an account to the factual features of his/her action or unlawfulness or guide oneself. Here two points should be underlined consciousness and will. In case of diminished responsibility, capability of awareness is reduced, as the ability to manage one's conduct is reduced. The last, from its part, lower the degree of guilt and causes lighter censure of action. The same idea was provided by the German criminalists R. Maurach and H. Zipfe. They indicated that diminished responsibility means reduced guilt. The fact that the perpetrator tried to compensate his diminished capability by means of straining his intellectual-moral may serve in his favor. If he yields to

the offensive impulse, it will mean that his ability to resist a fatal demand is reduced in comparison with a normal person. Decrease of ability to such extent ascertains the need to impose lighter punishment and accordingly, to reduce degree of guilt (Ivanov N., 1998, p.184). The Austrian scholars are at one with the German scientists in regard of issue of guilt. Guilt of a crime is expressed in objectively perpetrated conduct that opposes public order. It does not consider psychophysical characteristics of a delinquent, different from the guilt of offender, when all those impulses are taken into consideration causing the person to breach the existed restrictions. Within the framework of the offender's guilt, guilt has degrees that depend on the ability of a person to override the criminal intentions (Sementsova I, 1999, p.109).

As we mentioned, while determining degree of guilt many conditions should be taken into consideration (e.g. *corpus delictum*, subjective and objective elements, personality of the offender, reasons that caused the crime, etc).

From this point, the following example shall be interesting: "A" found his wife with her lover, at what moment he caused multiple injuries on the body of his wife's lover with axe. In result of those injuries the lover died. If we reckon that "A" perpetrated the murder with extreme severity, then degree of murderer's guilt would be rather high. However, at the same time, if we consider that he was in condition of temporary insanity, and then degree of his guilt will lower significantly. Temporary insanity (affect), as we know, causes disbalance between excitation and restraint processes and person yields to the impulse, though does not entirely lose ability to refrain. The last might be reduced, weakened. One more example: mentally diseased person committed a murder by generally dangerous means that indicates a high degree of threatening of this crime and severe punishment is envisaged for it, but when we take into consideration the fact that this action was perpetrated by the mentally ill person, punishment will be commuted, while referring to the degree of guilt. Coming out of these examples it could be proved that diminished responsibility condition influences the degree of guilt, reduces it and causes mitigated punishment. Psychophysical characteristics affect intellectual-volition processes and limit their analytical functions; these are reflected in the commitment of concrete actions. Thus, diminished responsibility appears as a mitigating circumstance of guilt, it influences the degree of guilt as well, lowers it and sets lesser censure.

Conclusion

In conclusion, the following should be stressed:

1. Pursuant to the Article 35 of the Criminal Code of Georgia, diminished responsibility is defined as a mitigating circumstance of guilt. Accordingly, the point is that in case of diminished responsibility any condition should be

taken into account that may influence guilt and reduce its degree respectively. Besides mental illnesses, such conditions could be temporary insanity, accentuation of character, etc. In such a state, as well as being mentally ill, the person cannot fully realize the actual character and unlawfulness of his action and thus, cannot guide himself/herself. Therefore, mental illness defined by Article 35 of the Criminal Code of Georgia as one of the and not the only circumstance causing diminished responsibility.

2. Prof. V. Serbsky mentioned that a person is considered to be unconscious not because he is mentally ill, but because his illness destroys his ability to control and guide his own conduct (Feinberg C., 1946, p.37). Based on this discussion, the logical conclusions are: 1) consciousness (legal responsibility) is a legal category and not a medical (psychiatric) one, 2) from the legal point of view, it will not be important to determine what caused the abolition of a person's ability to control or guide his own conduct fully at the moment of commitment of crime, 3) or whether it is mental illness or some other condition, that reduces the degree of one's guilt, 4) the committed action would be reckoned in accordance with the mitigating circumstance that indicates diminished responsibility. This requirement is defined by the Principle of Justice and Principle of Guilty Liability that serves as mandatory precondition to ensure a fair trial.

3. The main idea and purpose of diminished responsibility is that it should point out those circumstances that reduce the capability of the person to control and guide his/her own conduct fully at the moment of the commitment of the crime. These circumstances mitigate one's guilt. Therefore, all circumstances which mitigate one's guilt at the time of committing the crime, in spite of its causing grounds, may be regard as diminished responsibility.

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